
THE OVERSIGHT OF STATE MEDICAID FRAUD CONTROL UNITS

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INSPECTOR GENERAL**

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TRANSMITTAL MEMORANDUM

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AUG 25 1988

Memorandum

Date: *Michael Mangano*
Michael Mangano
From: Assistant Inspector General
for Analysis and Inspections

Subject: OAI Final Report: "The Oversight of State Medicaid Fraud
Control Units," OAI-01-87-00015

To: Larry D. Morey
Assistant Inspector General
for Investigations

Attached is our final inspection report on the oversight of State Medicaid Fraud Control Units (MFCUs). It includes, in appendix 3, the comments of the National Association of MFCUs to our draft report and our response to their comments and those of many individual State MFCUs.

In the final report, we retain and, indeed, reinforce our recommendations concerning the establishment of outcome-oriented performance indicators. Performance indicators are a valid and important management tool, being used with increasing success in many fields. Although there are some particular sensitivities involving their use in the law enforcement field, we strongly believe they can be effectively adapted by OI and individual MFCUs themselves. We offer a number of specific recommendations addressing how this might be accomplished.

In view of the National Association of MFCU's opposition to performance indicators, it is important to stress that Federal funding to the States for the establishment and operation of MFCUs is not an entitlement program. It is a grant program initiated by Congress to contribute to the elimination of fraud in State Medicaid programs. The Office of Investigations (OI), as the Federal entity responsible for the oversight of the MFCUs, must assure that MFCUs are advancing this congressional purpose. In carrying out this oversight responsibility, it is quite legitimate for OI to rely upon performance indicators in concert with other review mechanisms.

As we note in appendix 3, it is also important to recognize that the development of performance indicators is in accord with recent congressional history, as reflected in the Health Care Quality Improvement Act of 1986 (P.L. 99-660) and the Medicare and Medicaid Patient and Program Protection Act of 1987 (P.L. 100-93). These acts call for State licensing authorities and certain other entities to report to the

Secretary or his designee any adverse actions they take against health care practitioners. Moreover, the reports must be timely and include specific information on the actions taken and the practitioners involved.

Our second major area of recommendations concerns minimum staffing levels of MFCUs. Here, in response to concerns raised by MFCUs, we changed our recommended minimum from 10 professional positions to 7 to 10. Although we still feel that in nearly all cases it is important to establish a minimum of 10, we recognize that there are States where a lesser level might be more appropriate for a particular period of time. Accordingly, we lowered our recommended minimum to a range of 7 to 10. The OI, we believe, is best suited to determine the actual number.

In accord with this change, we have also removed our suggestion that waivers be allowed, and instead have urged that MFCUs with less professional staff than the newly established minimum be allowed a phase-in period to reach that minimum. We think that such an approach will allow for more equitable and simpler administration.

We appreciate the assistance that you and your staff provided us in conducting this study. We also appreciate the cooperation extended by the MFCU representatives with whom we spoke. If you have any questions, please let us know.

EXECUTIVE SUMMARY

PURPOSE AND OBJECTIVES

This inspection was conducted to help the Office of Investigations (OI) within the Office of Inspector General (OIG) strengthen its oversight of State Medicaid Fraud Control Units (MFCUs). It had two major objectives: (1) to determine to what extent and in what manner OI might rely upon performance indicators as a way of determining the effectiveness of MFCUs and (2) to assess to what extent and in what manner OI might rely upon minimum staffing requirements and/or ratios as a measure of effectiveness.

BACKGROUND

The inspection was based primarily on three lines of inquiry: (1) discussions with representatives of OI, the 37 current State MFCUs, and the National Association of Medicaid Fraud Control Units; (2) a review of data that MFCUs submit to OI; and (3) a review of various reports concerning MFCUs.

FINDINGS

- The MFCU directors expressed strong general support for performance indicators: 35 of the 37 directors (95 percent) agreed that performance indicators could be "a useful means of oversight of the operations of State MFCUs."
- At the same time, they raised a number of concerns about how OI might use or misuse performance indicators when making judgments about individual MFCUs. In this regard they stressed:
 - *the differences that exist in the authorities and working conditions of MFCUs,*
 - *the differences in the complexity of different types of cases, and*
 - *the distortions that indicators can cause in MFCU performance.*
- Only 16 of the 37 MFCU directors (43 percent) reported they use performance indicators in their own offices. Among them, most tended to focus on process elements, such as cases opened, worked, or cleared.
- Of the 37 directors, 27 (73 percent) felt that the minimum requirement of 3 professional staff was too low for an MFCU to carry out its responsibilities in an "effective and efficient manner." They emphasized that an MFCU operating at this minimum level would be too limited in the type of cases it could handle, vulnerable

to major disruption if a single staff member left, and probably would not be able to generate enough cases to keep an attorney busy.

- There is substantial variation in the average professional staff size of MFCUs. From 1984 through 1986, the range was from 4.7 to 251.8. During that time, 12 had an average professional staff of 9 or less and 18 had an average of 10 or more. Currently, 16 MFCUs have 9 or fewer professional staff.

RECOMMENDATIONS

- The OI should incorporate the use of performance indicators as part of its oversight of MFCUs. Toward this end, it should amend the MFCU regulations at 42 C.F.R., section 1002, 315(d) to allow for performance indicators to serve as a factor in considering an MFCUs reapplication for certification.
- In this regard, OI should:
 - *introduce performance indicators on a gradual basis,*
 - *strive for consensus on what indicators should be used,*
 - *use existing data sources to develop indicators,*
 - *focus on performance over a 2- or 3-year period, and*
 - *avoid an over-reliance on indicators.*
- As a start, OI, through policy issuances to the MFCUs, should establish the following set of performance indicators:
 - *indictments per professional staff,*
 - *indictments per \$100 million Medicaid expenditure,*
 - *convictions per professional staff,*
 - *convictions per \$100 million Medicaid expenditure,*
 - *dollar judgments per professional staff, and*
 - *dollar judgments per \$100 million of Medicaid expenditure.*

- After 1 or 2 years of experience in using performance indicators, OI, in consultation with the MFCUs, should develop some outcome-oriented standards that could serve as an important reference point in recertification reviews.
- The OI should increase the minimum staffing requirement from 3 professional positions to 7 to 10 professional positions. It should amend the MFCU regulations at 42 C.F.R. Section 1002.313 to stipulate that the total complement of staff must include at least 7 to 10 professionals trained as attorneys, auditors, or investigators. In so doing, it should allow for a phase-in period for existing MFCUs with less than 7 to 10 professional staff.

COMMENTS

The National Association of Medical Fraud Control Units and many individual MFCUs submitted comments reflecting concerns about our recommendations. Their comments and our reaction to them appear in appendix 3.

INTRODUCTION

BACKGROUND

In 1977, when Medicaid had grown to become a \$17 billion program (Federal/State expenditures), the Inspector General for the Department of Health and Human Services estimated that at least \$653 million of that amount was improperly paid because of fraudulent or abusive practices. An increased awareness of this situation, which threatened the integrity of the program, contributed to the passage in October 1977 of the Medicare-Medicaid Anti-Fraud and Abuse Amendments to the Social Security Act.

This legislation currently authorizes the Federal Government to fund 90 percent of the start-up cost and 75 percent of the ongoing cost of a State Medicaid Fraud Control Unit (MFCU). It stated that the responsibility of such a unit is to conduct a statewide program for investigating and prosecuting (or referring for prosecution) violations of all applicable State laws pertaining to fraud in the administration of the Medicaid program or the provision of Medicaid-funded services.

There are currently 37 State Medicaid Fraud Control Units. In Calendar Year 1986, the units were responsible for the expenditure of \$50.6 million. They accounted for 405 convictions, 611 indictments, and \$8,460,522 collected in fines, restitutions, and overpayments.

Prior to 1979, the Health Care Financing Administration bore responsibility for Federal oversight of the MFCUs. However, beginning in 1979, the Administration's awareness of congressional intent to strengthen and centralize fraud and abuse deterrence efforts led to the transfer of MFCU oversight from HCFA to the Office of Inspector General. Within the Office of Inspector General, the Office of Investigations (OI) is the operating component for the ongoing oversight of MFCU activities and performance.

The OI Oversight of the MFCUs: The OI's responsibilities, as stated in 42 C.F.R. Section 1002.315 include reviewing applications for both initial certification and annual recertification. For initial certification an MFCU must meet a number of basic requirements concerning organization, location, relationships with the Medicaid State agency, unit duties and responsibilities, and staffing.

For recertification, the MFCU must submit a reapplication which includes an annual report. This report provides data on investigations, outcomes, complaints, recovery actions, projections for the succeeding 12 months, unit costs, and a narrative of the unit's performance. In deciding upon recertification, OI must give "special attention to whether the unit has used its resources effectively in investigating cases of possible fraud, in preparing cases for prosecution, in prosecuting cases or cooperating with the prosecuting authorities." The OI's determination of whether or not an MFCU's resources are being used effectively is made by reviewing various materials such as the reapplication

and the annual and quarterly reports submitted by an MFCU, and periodically by conducting an on-site visit. At this point, however, no specific standards or performance indicators have been developed as a basis for determining an MFCU's effectiveness.

The OI increasingly has been interested in helping MFCUs improve their overall productivity. To this end, it has been suggested that less attention be devoted to process factors, such as cases opened and closed, and more to outcome factors, such as convictions, funds recovered, and contributions to successful civil monetary penalty (CMP) and sanction cases.

PURPOSE AND OBJECTIVES

The Office of Analysis and Inspections within the Office of Inspector General has been asked by the Inspector General to conduct a brief inquiry to assist the Office of Investigations in determining the directions it might take in strengthening its oversight of MFCUs. The Inspector General is particularly interested in Federal oversight concerning the overall productivity of the MFCUs and their appropriate staffing levels.

After some discussion, we decided that the primary objectives of this inspection would be twofold: (1) to determine to what extent and in what manner OI might rely upon performance indicators as a way of determining the effectiveness of MFCUs, and (2) to assess to what extent and in what manner OI might rely upon minimum staffing requirements and/or ratios as a measure of effectiveness. We zeroed in on these objectives because we felt their achievement could have an important bearing on the effectiveness of OI's oversight of MFCUs.

SCOPE

The inspection was based primarily on three modes of inquiry conducted simultaneously. The first involved a series of discussions with representatives of OI, the 37 current State Medicaid Fraud Control Units, the National Association of Medicaid Fraud Control Units, and 6 offices of the U.S. Attorney. In all cases but one, the representatives of the State units were their directors. (In forthcoming references, we will refer to these discussions as those held with the MFCU directors.) The discussions with the offices of the U.S. Attorney were brief ones and focused on their perspectives and experiences concerning minimum staffing levels. Those offices were selected at random.

The second mode concerned a careful review of the data that MFCUs submit to OI. The primary aim here was to identify the type of performance indicators that might be developed from available data and to determine the appropriateness of the data for that purpose.

Finally, the third mode centered around the review of a wide array of written materials concerning MFCUs. These included the pertinent regulations; a GAO fact sheet, *Medicaid: Results of Certified Fraud Control Units*; draft and final recertification review

reports for MFCUs; congressional documents pertaining to fraud and abuse legislation; and research materials concerning the use of performance indicators.

PERFORMANCE INDICATORS

PERFORMANCE INDICATORS IN PERSPECTIVE

In recent years, managers of both public and private organizations have indicated increasing interest in performance indicators (or measures). Many of them have come to view indicators as analytical devices that can be useful in improving productivity. They find that the development of indicators can help their organizations focus their energies on significant performance issues and can alert management to existing or emerging problems.

Performance indicators can focus on either process or outcome functions, or some combination of the two. What is best will depend on the particular setting and the objectives of management. If efficiency concerns are paramount, process indicators alone may be sufficient. If effectiveness and overall productivity are of concern, then outcome indicators are of greater importance.

Whatever the particular items being measured, performance indicators tend to be most helpful if they are analyzed in a comparative perspective. Thus, indicators can be used to compare the performance of similar types of agencies, of one agency over a period of time, or of an agency against some previously established standards.

In this way, performance indicators can provide valuable clues about how well an organization is doing and can signal possible problems. They can also help managers ask better questions about performance. If, however, they are used in too restrictive or rigid a manner, without appreciation of the complexities that can affect performance, they can be detrimental to organizational productivity. Managers who have used them successfully have found that a balanced approach works best; performance indicators should guide but not necessarily dictate decision making.

PERFORMANCE INDICATORS FOR MFCUs

We asked the State MFCU directors if they felt that performance indicators could be "a useful means of oversight of the operations of the MFCUs." The response was overwhelmingly positive. Of the 37 we asked, 35 said yes.

In their elaborations, it was clear that the directors were not necessarily thinking of indicators in the same way. Some discussed them primarily in terms of process characteristics; others more in terms of outcome factors. But the sentiment was strongly positive: if used properly, performance indicators could serve as a legitimate vehicle of managerial oversight for OI.

For example, one director said: "It is a useful way to gauge the effectiveness of different units. If one unit is significantly better, they [OI] could find out why and make recom-

mentations to other units." Another noted: "It's a good beginning point to get into what a problem might be." Still another said: "In general, it makes sense. OI has to know what it's getting for its money."

While expressing support in general terms, however, most directors were quick to point out some reservations and limitations. In some cases, in fact, these qualifications substantially watered down the initial expressions of support. Most of their concerns involved how OI might use or misuse performance indicators in making judgments about individual MFCUs. The directors tended to be wary of OI's using them in so rigid a manner that they might lead to an inaccurate picture of an MFCU's actual performance.

The most frequent concerns voiced by the directors were of three major types. The first concerned the substantial differences that exist among the MFCUs, particularly with respect to their authorities and working conditions. Many, for instance, noted that it would be unfair to compare convictions between an MFCU that has prosecuting authority and one that does not.

The second involved the differences in types of cases. Many noted that cases involving certain types of providers, such as clinics, nursing homes, or hospitals, tend to require much more time and resources than do others--for instance, those involving pharmacies or individual physicians. Similarly, others distinguished between fraud and personal abuse cases. One director noted that up to 40 percent of his unit's time tends to be spent on physical abuse cases.

The third set of concerns had to do with the distortions that could be generated by the application of performance indicators. Thus, activities that are not readily quantified, such as those that lead to State legislative or regulatory changes or that serve to deter fraud, could be down played in favor of the ones being scrutinized by OI. Thus, one director warned: "It's easy to get convictions if that's what you want. You get the defendant to plead guilty to a misdemeanor charge, and you focus on cases involving pharmacies and individual providers."

Given these concerns, it is not surprising that the State directors do not tend to rely heavily on performance indicators in managing their own units. Of the 37 interviewed, only 16 (43 percent) reported that they tend to use them as a managerial tool. And of those 16, most tend to focus on process elements, such as case development time or cases opened, worked, or cleared.

This is not meant to imply that the directors are unconcerned about outcome elements. They noted that by using a variety of mechanisms, such as regular staff meetings and employee performance evaluations, they are able to stay on top of outcomes and factors aiding or hindering them. Many added that their units are small enough that they do not need formal systems for measuring outcomes; some noted that if their staffs were to increase significantly, they would become more interested in such systems.

RECOMMENDATIONS

1. *The OI should incorporate the use of performance indicators as part of its oversight of MFCUs. Toward this end, it should amend the MFCU regulations at 42 C.F.R. Section 1002.315(d) to allow for performance indicators to serve as a factor in considering a unit's reapplication for certification.*

The OI has the responsibility for the Department to ensure that MFCUs are using their resources effectively. If it is to carry out that responsibility in an effective and equitable manner, it must identify some specific outcome-oriented factors that are associated with effective MFCU performance. Then, and of no less importance, it must use these factors as significant and consistent reference points in its reviews concerning the recertification of MFCUs. It is in this context that we urge the adoption of performance indicators.

2. *As it incorporates performance indicators into its review processes, OI should take careful account of the substantial experience that exists in this area in government and private industry and in particular of the specific concerns raised by MFCU directors. In this regard, we recommend the following to OI as it pursues implementation:*

- Introduce performance indicators on a gradual basis.

The OI, we feel, should move immediately to incorporate the use of performance indicators. But it is extremely important that OI start with only a few indicators that are clearly and strongly linked with the mission of MFCUs. This will allow both OI and the MFCUs to adjust to the new mechanism and to develop experience-based insights on how it might be improved.

- Strive for consensus on what indicators should be used.

The use of performance indicators will be much more successful if they are perceived by both OI and MFCUs to be relevant and fair measures of outcome. The OI should regularly consult with the MFCUs about what specific ratios might be employed as indicators and about what if any adaptations should be made in existing indicators.

- Use existing data sources to develop indicators.

In developing indicators, OI should be wary of any temptation to add to the data-reporting requirements imposed on MFCUs. Although at a later time some additions may be desirable, indicators at the outset should be based on existing data sources. This approach will make the transition to the new mechanism easier, and since substantial data on performance are now submitted regularly, there should be no problem in developing useful indicators.

- Focus on performance over a 2- or 3-year period.

Given the complexity and duration of many fraud cases, a single year as a frame of reference is probably too short a time to serve as a reliable indicator of performance. So many distortions could arise that the value of the indicator as a basis for comparison would be undermined. Two or 3 years would provide more valuable data. For that reason, OI might also find it desirable to seek a regulatory change that would extend the recertification period from 1 to 2 years.

- Avoid an over-reliance on indicators.

Remember that they are just *indicators* after all. Used properly, they can help OI ask better, more strategic questions as part of its oversight. They can help OI gain a more accurate determination of which units are performing well above the norm and which well below, and why. They can also help OI determine which States are gaining ground compared with their past performance, and which are falling behind, and why. Yet, even at best, these indicators will not provide a complete picture of an MFCU's performance. Also needed are careful on-site observations and reviews of an MFCU's reports and reapportionment materials. Each MFCU is different. Each has certain circumstances that affect its performance. The OI's oversight must be sufficiently fine-tuned that it takes account of these circumstances in making recertification decisions.

At the same time, of course, OI has a responsibility to the Department and Congress to keep them apprised of how well the MFCUs are doing in eliminating fraud in State Medicaid programs. If a particular MFCU is achieving comparatively poor results, OI must be concerned, even if those results are attributable to larger State-imposed constraints rather than to any failings of the MFCU itself. Thus, in a very real sense, OI is reviewing a State's performance as well as that of the MFCU in effectively controlling fraud. Performance indicators can help OI maintain an overall perspective and accountability.

3. *As a start, OI, through policy issuances to the MFCUs, should establish the following set of performance indicators:*

- indictments per professional staff,
- indictments per \$100 million Medicaid expenditure,
- convictions per professional staff,
- convictions per \$100 million Medicaid expenditure,
- dollar judgments per professional staff, and
- dollar judgments per \$100 million Medicaid expenditure.

Each of those ratios addresses basic outcome factors that are of interest to managers, legislators, and the public. Each can be developed from data regularly available to OI. In sum they do not offer a definitive assessment of any particular MFCU's overall performance, but, especially if aggregated over a 2- or 3-year period, they can provide a good overview of performance and serve as a useful guide to more detailed analysis of a particular MFCU's operations. That analysis can also address other elements of performance not directly reflected in the numerical indicators.

Why these particular ratios? We selected them after carefully considering the responses of the MFCU directors and reviewing the extent and type of data available to OI. With respect to numerators, indictments and convictions were two obvious selections, for they provide tangible indicators of an MFCU's impact in addressing Medicaid fraud.

Understandably, those associated with MFCUs that do not have prosecuting authority are wary of being held accountable for actions that are beyond their scopes. They tend to prefer an accounting based on investigations referred rather than on indictments or convictions. This is a reasonable concern and should be considered by OI when reviewing those particular MFCUs. But from a broader perspective, OI and the Department still have a compelling interest in reviewing a State's overall performance in bringing in indictments and convictions and should therefore maintain a continuing focus on the results being attained in those areas.

Financial penalties can also serve as the culmination of an MFCU's work on a particular case and thus is an indication of impact that warrants close review. We therefore selected dollar judgments as a third numerator. By dollar judgments, we are referring to four categories of data that MFCUs regularly report to OI: fines imposed, restitutions ordered, Medicaid program overpayment judgments, and other receivables judgments. At first we considered a numerator based on dollars actually collected, but we decided that judgments are sufficiently outcome-oriented and provide a better near-term indicator of an MFCU's success in the area of financial penalties.

With respect to the denominators, we chose professional staff (attorneys, investigators, and auditors) as one because it appears to be a reasonable indicator of the level of an MFCU's effort and because most of the MFCU directors were favorable to it. Especially notable was the fact that about two-thirds of the directors felt that performance indicators using indictments and convictions per professional staff were "worth serious consideration."

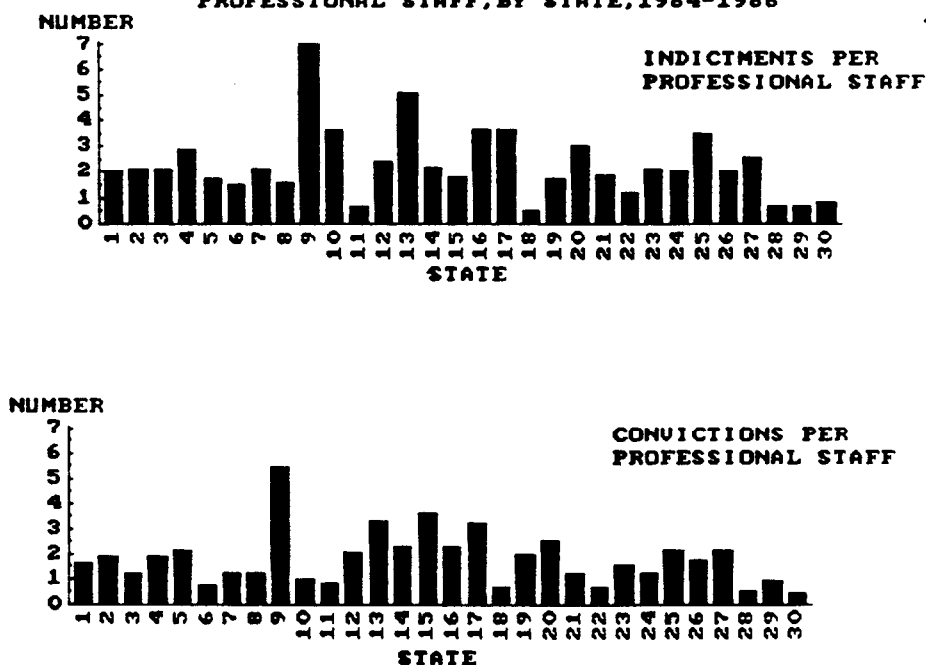
Our second denominator, Medicaid expenditures, was a more difficult selection. Our aim here was to choose an item that would serve as a reasonable overall indicator of the scope of the Medicaid fraud and abuse existing in a State. Otherwise, if review is limited to indictments, convictions, and dollar judgments *per professional staff*, an MFCU with a comparatively small staff but located in a State with a sizable Medicaid program could appear to have a much greater impact than is actually the case.

Along the same lines, we initially considered total number of Medicaid providers or Medicaid recipients as a denominator. But neither received majority support among the MFCU directors, and in both cases, it appeared there would be some problems in obtaining timely and accurate data.

Finally, on the basis of suggestions offered by some MFCU directors, we chose total Medicaid expenditures per State as a denominator (or more precisely, total Medicaid expenditures presented in increments of \$100 million). By that, we mean total Federal and State Medicaid dollars (program and administrative) expended in a State during a calendar year. Such data can be readily obtained and serve as a reasonable proxy for the scope of the job facing an MFCU. Generally speaking, the incidence of Medicaid fraud and abuse in those States with comparatively high Medicaid expenditures is likely to be higher than those with lower expenditures.

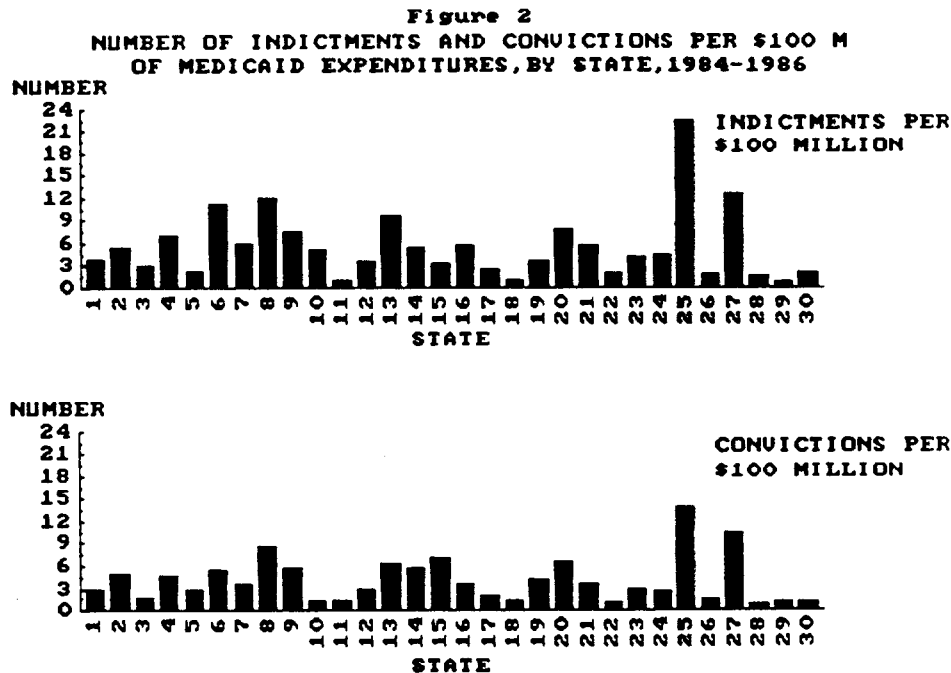
For each of the six performance indicators identified, OI might find it useful to make certain distinctions when using them for comparative purposes. It might, for instance, wish to distinguish those MFCUs having prosecuting authority from those that do not. Similarly, it might find it useful to distinguish indictments, convictions, and dollar judgments by type of providers (since cases concerning some types tend to take longer than those for others). Making the latter distinction will add somewhat to the complexity of the data gathering and presentation, but it may well be worthwhile. If OI chose at the outset not to incorporate this distinction into the compiled performance indicator data, it should pay careful attention during its recertification reviews to the types of Medicaid providers that are being indicted, convicted, and/or financially penalized. Such information can help explain the performance statistics.

Figure 1
NUMBER OF INDICTMENTS AND CONVICTIONS PER
PROFESSIONAL STAFF, BY STATE, 1984-1986



Source: Quarterly Statistical Summary
reports submitted by MFCUs to Office
of Investigations

Figure 1 provides an illustration of the potential usefulness of performance related data. It presents data for a 3-year period (1984-1986) for two of the performance indicators listed above: indictments per professional staff and convictions per professional staff. The 30 MFCUs functioning throughout the period are represented. What is most striking in the figure is the wide distribution in performance, ranging from one MFCU that averaged 7.03 indictments and 5.41 convictions per professional staff to another that averaged .83 and .41, respectively, for the two indicators. For those well above or well below the averages for the 3 years, the logical question for OI and the MFCUs to ask is: why? Are there unique factors beyond the control of the MFCUs that explain the substantial variance? Or are there certain factors attributable to the MFCUs that account for the high or low performance?



Source: Quarterly Statistical Summary reports submitted by MFCUs to OI and Medicaid Financial Management Report, FY 1985

Similarly, one can note the extent of the spread between indictments and convictions in a particular case and pose questions about why certain States deviate sharply from the norm. This sort of representation and questioning can, of course, be directed to the trends in any MFCUs performance over time. The insights that emerge would be useful to OI in conducting its oversight, but probably even more useful to the MFCUs as they assess their own performance and seek ways to improve. Figure 2 presents two other performance indicators: indictments per \$100 million of Medicaid expenditure and convictions per \$100 million of Medicaid expenditure. These data add valuable perspective to the set in figure 1. Compared with that data figure 2 shows that MFCUs that appear as top performers when professional staff size is the frame of reference do not necessarily enjoy the

same status when overall Medicaid expenditures are considered and vice versa. Again, questions arise the answers to which can provide a better overall understanding of performance.

Finally, appendices 1 and 2 present data concerning the two remaining performance indicators: dollar judgments per professional staff and dollar judgments per \$100 million Medicaid expenditure.

4. *After 1 or 2 years of experience in using performance indicators, OI, in consultation with the MFCUs, should develop some outcome-oriented standards that could serve as an important reference point in recertification reviews.*

It is vital that OI view performance indicators in a developmental sense. That is, OI must take care to learn from its experience in using indicators and make adaptations in the system as necessary. Responsiveness to feedback is especially important during the first year or two when the new approach is being put into place.

After that initial period, OI, with the participation of MFCUs, should define and establish some performance-based standards. These should focus on key desired outcomes associated with MFCU activities and might be defined in terms of comparative rankings. For instance, a standard might be set that over a 2-year period each MFCUs performance should fall within a certain percentage of the national average or mean on a given indicator. An MFCU falling below the standard would be required to develop a corrective action plan, unless it had some compelling explanation to account for the aberration. If, after a designated period of time, performance did not improve, OI should take that seriously into account when making a recertification decision. In those instances when MFCUs performed well above the established standards, OI could determine if some of their practices might be adopted by other MFCUs. Then OI might offer technical assistance and information to encourage widespread implementation of the successful practices.

MINIMUM STAFFING REQUIREMENTS

DISCUSSION

Current MFCU regulations at 42 C.F.R. Section 1002.313(a) require that a unit "employ sufficient professional, administrative, and support staff to carry out its duties and responsibilities in an effective and efficient manner." In addition, they specify that the staff must include:

1. "One or more attorneys experienced in the investigation or prosecution of civil fraud or criminal cases..."
2. "One or more experienced auditors..."
3. "A senior investigator with substantial experience in commercial or financial investigation..."

These regulatory requirements were promulgated in 1978 at the inception of the Medicaid fraud control program and were established without the benefit of an opportunity to review the actual operations of MFCUs to determine more precisely their minimum staffing needs. However, the MFCUs have now been in operation for nearly a decade, and in recent years the OI staff has expressed the concern that the current minimum requirement of three professional staff may be inadequate to effectively and efficiently carry out the current responsibilities of an MFCU, even one in a small State. Given these concerns, we were asked to determine if there was sufficient rationale to increase the minimum and, if so, what the ratio of professionals should be.

We asked the MFCU directors if the current minimum staffing requirements were adequate "to assure that MFCUs carry out their responsibilities in an effective and efficient manner." The response was overwhelming negative, with 27 of the 37 (73 percent) answering no. Collectively, the directors offered several persuasive reasons why the three professional staff minimum was too low.

One reason concerned unit stability. The directors felt that a unit with only three professional staff would be vulnerable to major disruption if a single staff member left. For example, a unit with only one auditor, investigator or attorney would be left operationally immobile if any one of these professionals resigned, took extended leave or was otherwise absent from the unit. Such a unit would, at least temporarily, be unable to conduct audits, or investigations or would lack legal guidance and advice. In such an instance, the unit could not effectively carry out its duties and responsibilities.

Also, the directors noted that one auditor and investigator probably could not generate enough cases to keep an attorney busy. They generally felt that at least four investigators or auditors were needed to keep one attorney fully engaged.

While the situation is not directly comparable, we noted in reviewing the activities of U.S. Attorney offices that in Fiscal Year 1984 the average caseload of an Assistant U.S. Attorney was 130, a level of activity well beyond what an MFCU with one attorney, one auditor and one investigator could hope to sustain. Moreover, during discussions with representatives of a number of these offices, we heard substantial confirmation for the observation that more than two full-time equivalent's worth of an investigator's and/or auditor's time was necessary to assure a steady flow in the pipeline of cases for the Assistant U.S. Attorneys. Accordingly, we conclude that in most instances an MFCU staff which includes only one auditor and one investigator could not generate enough case activity to efficiently utilize the staff attorney's services.

Finally, the directors noted that a unit operating at the three staff minimum would be limited in the type and complexity of cases it could handle. For example, one director noted that: "A single nursing home case can eat up to 500 hours of an auditor's time" Thus a higher minimum number of auditors and investigators would be needed to allow an MFCU to effectively investigate certain complex cases such as nursing home cases.

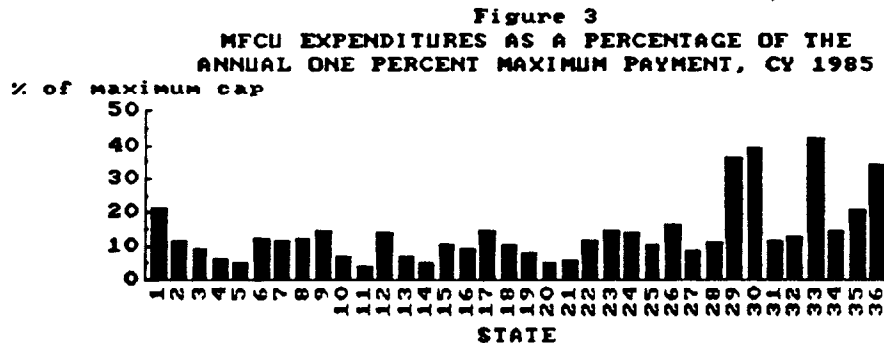
Moreover, interviews with the OI staff persons who administer the Medicaid fraud control program indicate that higher minimum staffing levels will be needed to allow smaller MFCUs to effectively carry out the responsibilities contemplated by OI. OI is pursuing policies to expand the investigatory responsibilities of MFCUs. For example, a regulatory change is contemplated which would authorize MFCUs to engage in sophisticated computer screening activities to identify fraudulent provider claims (see Addendum). And OI is currently encouraging MFCUs to establish telephone "hotlines" to encourage concerned persons to directly report suspected cases of Medicaid fraud and abuse. These new activities should increase case activity and generate an additional workload which a smaller MFCU, as currently staffed, may be unable to meet.

The survey of directors provided no consensus as to the appropriate minimum staff size or whether we should specify a ratio of auditors to investigators to attorneys. The directors gave answers ranging from 4 to 10 regarding staff size; but 20 of the 37 directors felt that no ratio of professionals should be specified.

Currently, the professional staff sizes of MFCUs vary widely. For those operating during the 1984-1986 period, the range was from an average of 4.7 to 251.8. During that period, 12 MFCUs had an average professional staff size of 9 or less and 18 had a professional staff size of 10 or more. Currently, 16 MFCUs have a staff of 9 or less. Of the 37 directors we contacted, 24 stated their current staff size was adequate.

In this context, it is also pertinent to note that the 1977 legislation establishing MFCUs stipulated that during any year Federal financial payments in support of an MFCU could be as much as 1 percent of the State's total Medicaid expenditures. This meant that in calendar year 1978, when Federal-State Medicaid expenditures were about \$19 billion, aggregate MFCU expenditures could have been as high as \$190 million. Similarly in

Calendar Year 1985, when Federal-State Medicaid expenditures had grown to about \$40 billion, total MFCU expenditures could have reached about \$400 million.



Source: Quarterly Statistical Summary Reports submitted by MFCU's to OI and Medicaid Financial Management Report, Fy 1985

In practice, however, MFCU expenditures have been far below these maximum levels. In fact, in 1985, the \$47.5 million in MFCU expenditures accounted for only 25 percent of the 1978 maximum and 13 percent of the 1985 maximum. Moreover, as figure 3 illustrates, none of the MFCUs in 1985 achieved a level of expenditure that exceeded 50 percent of its 1 percent limit. The highest was at 42 percent of the cap. Most were well below 20 percent.

Thus, although Congress did not necessarily intend that each MFCU spend at its maximum level, it is clear that MFCUs are operating at a level far less than Congress was prepared to spend to support them. In a report accompanying the 1977 legislation, the House Committee on Interstate and Foreign Commerce clearly and strongly expressed its concern that "sufficient efforts have not been made to date to identify and prosecute cases of Medicaid fraud in a number of States" and expressed its expectation that the MFCU legislation would lead to more vigorous State activity "to assure that those engaging in criminal activities are identified and prosecuted."

RECOMMENDATION

The OI should increase the minimum staffing requirement from 3 professional positions to 7 to 10 professional positions. Toward this end, it should amend the MFCU regulations at 42 C.F.R. Section 1002.313 to stipulate that the total complement of professional staff must include at least 7 to 10 professionals trained as attorneys, auditors, or investigators.

We conclude that the minimum staffing requirements should be increased from 3 professional positions to 7 to 10 professionals. We arrived at this range based on several considerations.

First, the need to maintain unit stability requires that each MFCU have at least two auditors, two investigators and two attorneys for a total of six professional positions. As noted, earlier, MFCUs with only one auditor, one investigator or one attorney are vulnerable to disruption by the resignation or absence of one professional staff person. Requiring an additional auditor, investigator and attorney would enhance stability because, in the event of the absence of one of them, the unit would still have in-house access to audit, investigative and legal services and could continue to carry out its investigative and prosecutorial responsibilities effectively.

In addition to the six staff positions needed to maintain unit stability, four additional auditor/investigator positions would be needed to keep the two attorneys fully utilized. According to many MFCU directors, at least four auditors/investigators are needed to keep an attorney busy. Thus it would seem that an MFCU staff with two attorneys would require at least eight auditors/investigators to keep an attorney busy. This suggests a minimum professional staff of 10 persons. This staff should be composed of at least two auditors, two investigators and two attorneys with four other professional positions which the affected MFCUs should be given discretion to fill with persons trained as auditors, investigators, or attorneys.

We realize that determining the ideal minimum staff is complicated by the fact that some MFCUs vary in operation, particularly with respect to prosecutorial authority. (Some MFCUs actually prosecute cases while others merely refer cases for prosecution to the State Attorney General or other State prosecutorial authority.) In recognition of this variability, we suggest that OI consider developing a mandated minimum in the range of 7 to 10 professional positions. Moreover, we suggest that for those MFCUs under the minimum staffing level established, OI allow them a phase-in period to reach the minimum level.

We believe that the proposed minimum staffing level would not only enhance stability and attorney utilization with respect to the smaller MFCUs, but would also allow them to conduct the more complex type of investigations and carry out the broader fraud detection activities which OI is encouraging MFCUs to undertake.

In proposing this higher minimum level, we do not intend to imply that it is necessarily a sufficient level of staffing, even for an MFCU in a State with a comparatively small Medicaid budget. It is merely a minimally acceptable level, below which, we feel, an MFCU may not be able to effectively and efficiently carry out its duties and responsibilities.

By increasing the minimum staffing requirement, the Federal Government, at relatively little extra cost, would substantially increase the potential effectiveness of some of the small MFCUs. This would apply most directly to the 16 currently certified MFCUs having 9 or less professional staff members. In this context it is helpful to recognize that from 1984 to 1986, MFCUs with 10 or more staff accounted for 87.7 percent (1043 out of 1189) of all MFCU convictions.

With more staff, a number of MFCUs would also be in better position to take advantage of some of the opportunities afforded by the recently enacted "Medicare and Medicaid Patient and Program Protection Act of 1987" (P.L. 100-93). These include a provision allowing for MFCUs to receive (1) a pro-rated portion of civil monetary penalties imposed by the Office of Inspector General and (2) information, through a national clearinghouse, on disciplinary actions taken by State licensing authorities against health care practitioners and providers.

Finally, notwithstanding the need for a higher minimum staffing level, we reiterate the importance of OIG also focusing on the measurement of outcomes. In general, it should allow the MFCUs considerable flexibility in how they go about their work, but hold them clearly accountable for the results. The establishment and intelligent use of performance indicators would be important steps in that direction.

ADDENDUM

As an addendum to this report, we include discussions and recommendations on two additional matters that were not technically part of the inspection but which are very much related to the oversight of MFCUs. The comments and recommendations emerge from the experiences of the OIG in conducting oversight of the MFCUs and in various ways tend to be reinforced by the most recent OAI inspection. Because both of the recommendations set forth will call for changes in the regulations governing MFCUs, we felt it best to include them here so that they would be considered along with the proposed regulatory changes concerning performance indicators and minimum staffing levels.

REQUIREMENTS FOR FULL-TIME AND PART-TIME EMPLOYEES

The current regulations require that the professional staff of an MFCU be full-time employees. (See 42 C.F.R. Section 1002.301 and 1002.319(e)(4).) This requirement reflects Congress' intent that MFCUs bring together a specialized expertise in Medicaid fraud by developing a team of lawyers, investigators and auditors. Hiring temporary or part-time staff does not contribute to developing a team with such specialized expertise. The Department has concluded that this congressional intent can only be achieved if the MFCU hires full-time, long-term professional staff. (See 43 C.F.R. 32078-9, July 24, 1978 and Fraud Control Memorandum No. 79, May 4, 1979).

The current regulations pose several problems. They are unclear as to when an MFCU can hire part-time, as opposed to full-time, employees. In fact, the regulations provide no express authority for MFCUs to hire any part-time employees. However, through policy transmittals and responses to individual queries, OI has interpreted the regulations to authorize MFCUs to hire short-term or part-time employees in non-professional positions (i.e., clerical, administrative and support positions). (See Fraud Control Memorandum No. 79, *supra*).

Moreover, the regulations are unclear as to the requirements of a full-time employee. In response to individual queries, OI interprets the regulations to require that a full-time employee work "exclusively" on Medicaid fraud control matters and work under the "direct supervision" of the unit. However, this administrative interpretation is not expressly reflected in the regulations.

The lack of clarity regarding the requirements of full-time employees and the MFCUs authority to hire part-time employees has resulted in confusion in interpreting the Medicaid fraud control regulations. This confusion is reflected in the fact that questions concerning these areas have been frequently raised by various MFCUs in their contracts with OI staff.

Recommendation

The Department should amend the regulations to specify that a "full-time" employee must work exclusively on Medicaid fraud control matters and must work directly under the supervision of the unit. The Department should also amend the regulations to expressly authorize MFCUs to hire "part-time" non-professional staff.

This recommendation would eliminate the current confusion regarding full-time and part-time MFCU employees, obviate the need for OI to respond to frequent MFCU queries on these matters and thus enhance OI's administration of the program. The recommendation would not implement new policies; it would merely require OI to formally publicize its current policy in this area by issuing a formal regulation.

EXPANDING MFCU FRAUD DETECTION AUTHORITY

The program regulations are unnecessarily restrictive and confusing as to the extent MFCUs can engage in fraud detection activities. The regulations at 42 C.F.R. Section 1002.319(e)(2) provide that Federal Financial Payment (FFP) is not available for expenditures attributable to:

"(2) Efforts to identify situations in which a question for fraud may exist, including the screening of claims, analysis of patterns of practice, or routine verification with recipients of whether services billed by providers were actually received . . ."

The literal language of this paragraph seemingly prohibits FFP for unit detection activities, and this has resulted in confusion among units as to the extent to which they can receive FFP for detection activities. But OI has interpreted this paragraph to prohibit FFP only for the routine program monitoring activities which are normally the responsibility of the Medicaid agency (such as routine screening, routine desk review of patterns of practice of providers "flagged" by screens, routine Explanation of Benefits mailings, etc.). (See, Division of State Fraud Control, Circular No. 5). According to the OI interpretation, this provision allows FFP for sophisticated detection activities, such as undercover operations. However, OI has not amended the regulations to clearly reflect this interpretation.

Moreover, discussions with OI staff indicates that it would be desirable to expand MFCU detection authority by allowing MFCUs to engage in screening activities which may arguably overlap with Medicaid agency fraud detection responsibilities. This expanded detection authority would make it possible for MFCUs to generate additional fraud cases and would be particularly helpful in States where the Medicaid agency makes an inadequate number of fraud referrals to the MFCU. The MFCU could compensate for this shortfall by, for example, using computers to screen Medicaid provider claims and analyze billing patterns to identify cases of fraud.

Recommendation

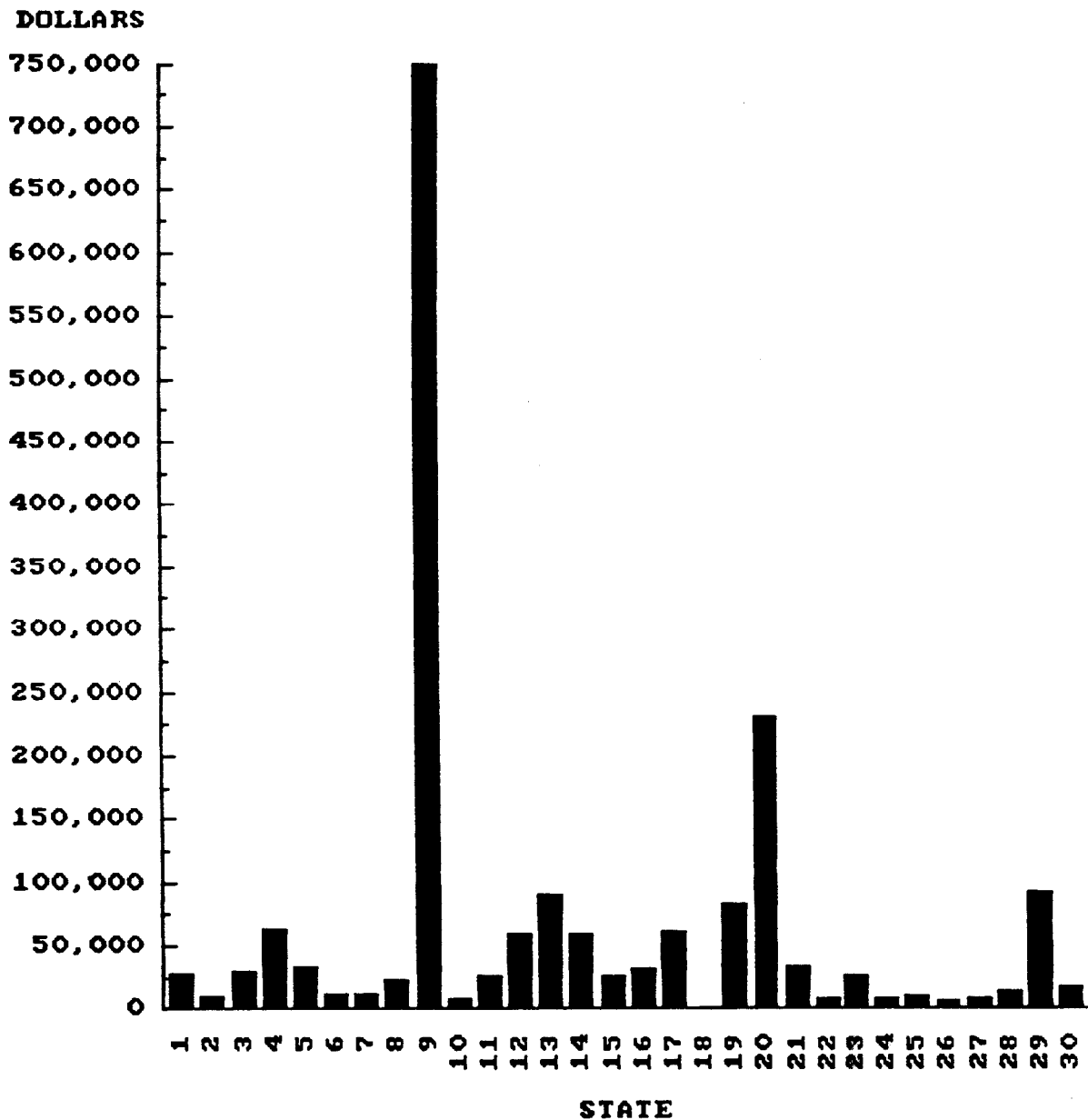
The OI should consider developing a regulatory proposal to (1) clarify that MFCUs can engage in sophisticated detection activities and (2) authorize MFCUs to engage in fraud detection screening activities.

This expanded fraud detection authority would allow MFCUs to generate additional fraud cases and increase the number of fraud convictions. This recommendation would also give MFCUs more control over their overall case load and make them less dependent on Medicaid State agency case referrals. This should enhance the effectiveness of some MFCUs especially those experiencing inadequate Medicaid agency case referrals.

Even with such a change, however, we recognize that it is important for Medicaid State agencies to play an active part in referring cases of potential provider fraud to the MFCUs. In our discussion with MFCU directors, a number of them expressed concern that they were not receiving sufficient referrals of this kind. Accordingly, we have included in the Office of Analysis and Inspection workplan for FY 1988 an inspection addressing the effectiveness of the State Medicaid agency referrals of potential provider fraud cases to the MFCUs. The inspection is now in the data gathering phase and is expected to be completed in early FY 1989.

APPENDIX 1

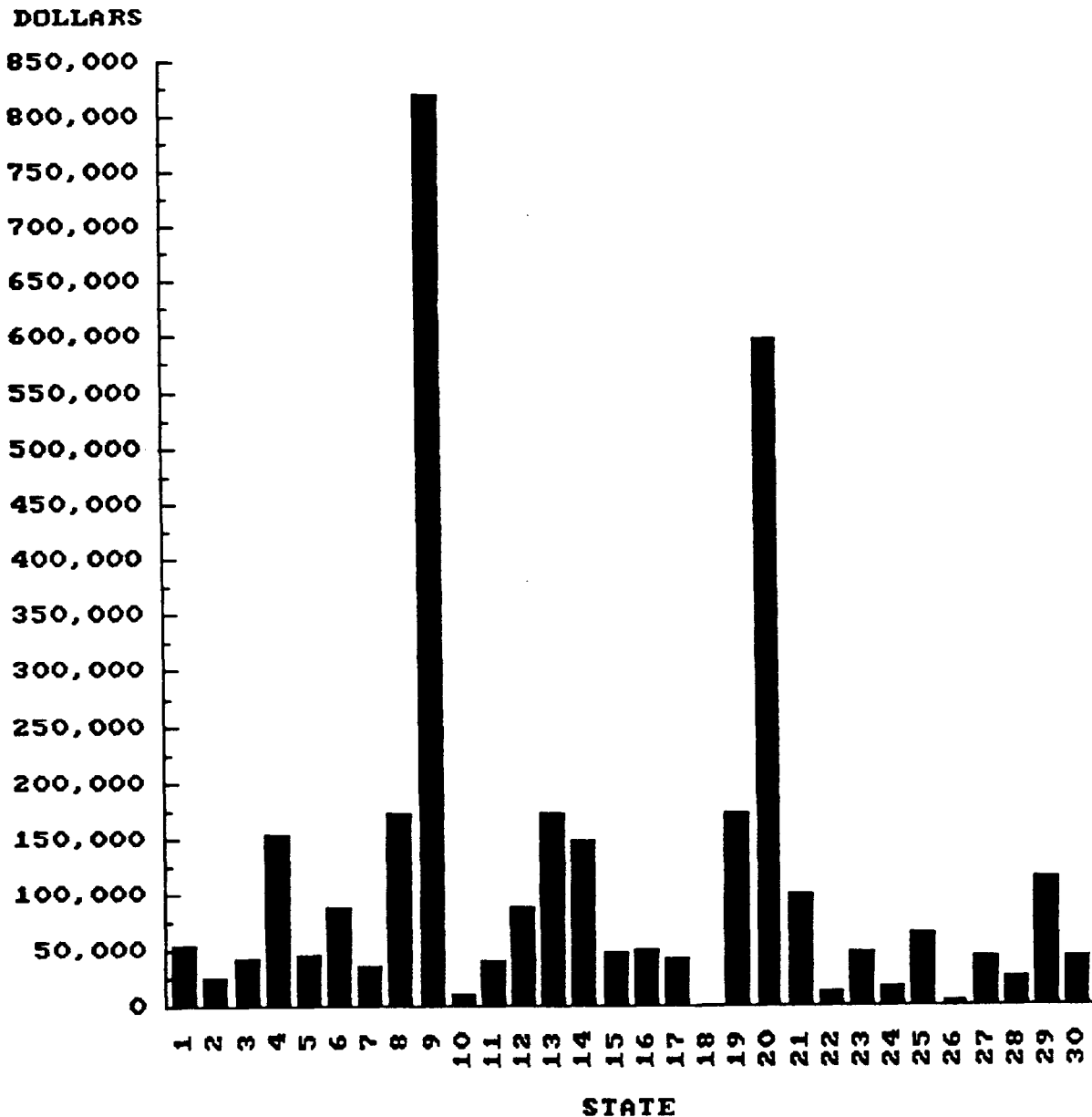
DOLLAR JUDGEMENTS PER PROFESSIONAL STAFF, BY STATE, 1984-1986



Source: Quarterly Statistical Summary
reports submitted by MFCUs to Office
of Investigations

APPENDIX 2

DOLLAR JUDGEMENTS PER \$100 MILLION OF MEDICAID EXPENDITURES, BY STATE, 1984-1986



Source: Quarterly Statistical Summary reports
submitted by MFCUs to OI and Medicaid Financial
Management Report, FY 1985

APPENDIX 3

COMMENTS ON OIG DRAFT REPORT AND OIG RESPONSE TO COMMENTS

We received comments on the draft report from the president of the National Association of Medicaid Fraud Control Units (MFCUs), who is also the director of the Washington State MFCU, and from representatives of 19 other MFCUs. Most of these comments focused on our recommendations calling for the use of performance indicators and expressed substantial reservations about these recommendations. The comments on our recommendation calling for a minimum staffing level of 10 were fewer and less in-depth, but here too, there were some fundamental concerns expressed.

The main concerns of the individual MFCUs are reflected in the comments of the National Association of the MFCUs. Indeed, a number of the MFCUs specifically endorsed the National Association's comments. Because of that we present below, in full, the National Association's comments. We follow that with our response to MFCU concerns, first with respect to performance indicators and then minimum staffing levels. We close with a brief note concerning one of the recommendations presented in our Addendum.

NATIONAL ASSOCIATION OF MFCUs' COMMENTS

Performance Indicators

A. Analysis

The use of statistical output ratios such as indictments, convictions, funds recovered per employee and size of State Medicaid Programs to evaluate the performance of a law enforcement agency would be inappropriate. The draft report is incorrect in stating that the Units would concur in using such ratios as performance indicators. And as the report correctly details (on page 5), the Unit Directors made it clear that they consider that any use of such ratios to compare Units by the Office of Inspector General would be particularly inappropriate.

Since the inception of the Fraud Unit Program, the Fraud Units, prosecutors, and attorneys general have consistently opposed attempts to base the evaluation of the Units upon such numerical criteria. In the first year of the Program, HHS attempted to organize the evaluation of the Fraud Unit Program with the same quantitative methods criteria that it uses to evaluate the performance of its social service programs. A lengthy debate followed that led to formal HHS recognition that the statistical output norms HHS applies to social service program administration could not, and should not, be applied to prosecutorial activity. The result was the transfer of oversight activity from HCFA to OIG to facilitate evaluation of the Units on a qualitative basis by personnel with training and experience in white collar crime prosecution, and who would, presumably, be able to understand and individually evaluate prosecutorial decision-making. As the attached let-

ter of former Inspector General Thomas Morris observes, the use of quantitative, "cost effectiveness" measures, to evaluate criminal investigations and prosecutions is inappropriate and does not give a valid picture of Unit accomplishments.

Prosecutorial activity does not lend itself to standardized measurement, review and comparison. States have substantively and procedurally distinct legal and penal systems. These individual differences effect the ability to prosecute white collar crime from State to State. Some State laws restrict plea bargaining while others control the exercise of prosecutorial discretion on disposition and sentencing matters. Even more basic is the problem of comparing cases. Each is different and the handling of each must be assessed in the context of its unique set of facts and circumstances. Some cases include confessions, making possible a swift resolution. Others such as nursing home, hospital and HMO cases, span multiple cost years with thousands of questioned documents which may require years of investigation and months of trial. An exceptional number of variables effects the number of cases a MFCU receives and, or, develops on its own, and how those cases are resolved. They make any strictly numerical comparisons of the outcome of criminal investigations and prosecutions subject to so many qualifications as to be virtually meaningless and their use without such qualifications inaccurate, arbitrary, and unfair.

An exclusive focus on the indictment, prosecution and monetary recovery ratios of the Fraud Units would inevitable result in the creation of de facto "prosecution quotas." "Prosecution quotas" in any form raise obvious constitutional and serious ethical problems for both OIG and the Fraud Units. Prosecutors are sworn to do justice, according to their independent and impartial judgment. The impartial application of that judgment would be seriously compromised if Fraud Unit prosecutors are influenced by a need to meet an indictment quota. This problem has long been a major concern of the criminal bar and legal profession. The authoritative American Bar Association *Standard Relating to the Prosecution and Defense Function* states as follows:

S 3.9 (c) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his record of convictions.

Commentary to S 3.9 (c) The prosecutor should avoid measuring his record by the (conviction rate) of his office. He should never allow the decision to proceed in a particular case to be influenced by his desire to inflate his record of success in obtaining convictions. Nor should he hesitate to reduce the charge or decline a prosecution because of such considerations.

Clearly, to use the number of criminal indictments, convictions, and monetary judgments as Fraud Unit performance indicators, would directly conflict with these recognized standards for preserving prosecutorial integrity. The Office of Inspector General has a clear duty to avoid creating a system of performance evaluation that encourages unethical acts by prosecutors. Simply stated, a State prosecutor's exercise of discretion in deter-

mining who to indict/prosecute should not and must not be influenced by a fiscal need to achieve arbitrarily set Federal prosecution quotas.

The ultimate purpose of the Medicaid Fraud Control Unit Program is to deter Medicaid fraud and patient abuse. These goals are achieved in numerous ways, none of which are accurately accessed by simply looking at raw output data. Examples: many investigations necessarily do not produce prosecutions, though they may ultimately play a significant role in preventing fraud; patient abuse investigations are a statutory responsibility of the Fraud Units, though again, they produce few indictments and virtually no financial recovery; the Units are charged with oversight of the administration of the program, which they discharge by regularly developing program recommendations which assist their various States in eliminating opportunities to commit fraud; the Units aggressively document civil recovery opportunities and report the same to single State agencies for recovery; the Units take similar action with respect to conduct that can be sanctioned by professional licensing boards. All of these activities are federally required and encouraged. Yet the proposed "performance indicators" would not only ignore these important functions, but would actually penalize the Units for devoting sufficient time and effort to these responsibilities.

Imposition of conviction oriented comparisons could also result in Units actually reducing staff to increase the ratio of convictions per professional, a result which does not further the stated goal of detecting, prosecuting, and deterring fraud. The Attorneys General and State prosecutors must be relied upon and supported in their use of resources to best accomplish these goals. A viable and credible Fraud Unit which aggressively investigates and prosecutes Medicaid fraud and patient abuse will command respect within the State's law enforcement community, from the State's Medicaid Program and from Medicaid providers. A quota system would work against recognized methods of accomplishing these goals while reducing the reputation of the Units to the status of "bounty hunters".

B. Recommendations

As previously stated, the Units recognize the partnership of interest which exists between Congress, the Office of Inspector General, and the Medicaid Fraud Control Units. We share the common goal of achieving the congressional intent of identifying, investigating, and prosecuting Medicaid Fraud, related crimes, and crimes of patient abuse. Cooperation between MFCUs and OIG is essential if the MFCUs are to provide credible and effective law enforcement and the Office of Inspector General is to provide credible and effective oversight.

Oversight of the Medicaid Fraud Control Units would be greatly improved if the Office of Inspector General would return to its former practice of using law enforcement professionals with senior experience in white collar crime investigations, prosecutions, and management of law enforcement agencies, to conduct its Fraud Unit evaluations. Only

through the use of such experienced staff can the Office of Inspector General adequately assess the vast array of variables that must be considered when analyzing a Unit's performance. Analysis of Unit performance should be based on the separate consideration of what that Unit has accomplished in the context of its existing circumstances.

Medicaid Fraud Control Units are one of the very few enforcement agencies which handle cases from virtual inception to ultimate appellate review. Unlike a typical prosecutor's office, where criminal activity "presents" itself, MFCUs are uniquely dependent upon the consistent flow of referrals from single State agencies to maintain levels of investigations and prosecutions. Many different approaches have been instituted by Units to generate investigative leads (pro-active shopping, multi-agency task forces, targeting, etc.). Individual State Medicaid program referrals and regulatory inadequacies must be analyzed and taken into consideration when reviewing Fraud Unit performance.

Contrary to the premise taken in this study, if Units have "production" problems, the only meaningful analysis is of case flow, investigative effectiveness, and investigation management. Fraud Units operate in a criminal justice system which measures all outcomes by the process followed. The proper measure of Unit performance would therefore be a meaningful analysis of their management of the investigative process. An important role of the Inspector General recertification process should be to determine if the Unit is a viable and active law enforcement entity with respect to the particular State and program it polices. To this end, an analysis of a particular Unit's function should be qualitative and particularized, rather than based on a necessarily futile exercise in trying to do standard comparisons of dissimilar and non-comparable circumstances. Effective oversight by the Office of Inspector General also requires analysis and resolution of problems wherever they exist, not just with MFCUs. For example, to cite a Unit for failing to achieve performance goals ("quotas") where an independent analysis would have revealed the problem exists with the quantity or quality of referrals from the single State agency would result in a Unit being unfairly sanctioned, a problem unresolved, and an oversight responsibility unfulfilled.

Minimum Staffing Requirements

It is our understanding that the Office of Inspector General would not seek to retroactively apply any minimum staff requirements to existing certified Units. It should be recognized that some States have very small Medicaid Programs with a resulting low number of investigative referrals. Within this context, many of the smaller Units have been successful in establishing a meaningful law enforcement presence to include orderly investigations and prosecutions. The Association believes that five professionals as opposed to the study's recommended 10 would be the appropriate minimum staff requirement. Again, the realities of each State's circumstances are of critical importance in analyzing staff levels.

Conclusion

State MFCUs are staffed by highly motivated professionals who daily endeavor to successfully discharge their responsibilities. While some Units may have "production problems," simplistic attempts to analyze those problems by using standardized output statistics will improperly and unethically invade the province of prosecutorial discretion by establishing an evaluation process based on "quotas," and so distort the complex variables of prosecutorial activities as to be essentially meaningless. These proposed indicators will not help the Units in analyzing their own productivity, will result in inappropriate criteria being used to make prosecutorial decisions, and will not provide a measure of a Unit's success in deterring fraud. Overall, they provide no way to assess the total positive impact the Units have in their State. We are not opposed to performance evaluation, indeed as we have often observed, we regard it as an important tool for strengthening the Fraud Unit Program. But first, the methods chosen to conduct such evaluations must accurately measure Unit performance.

Representatives of the Association would be pleased to meet you and/or any appropriate staff to further pursue this issue.

OAI RESPONSE

Performance Indicators

At the outset we must note that the Federal funding to States for the established and operation of MFCUs is not an entitlement program. It is a great program intended by Congress to contribute to the elimination of fraud in State Medicaid program. The Department, and OI in particular, are responsible for assuring that this congressional purpose is being advanced.

We must also note that the development of performance indicators as an element of Federal oversight is in accord with recent congressional history, as reflected in the Health Care Quality Improvement Act of 1986 (P.L. 99-660) and the Medicare and Medicaid Patient and Program Protection Act of 1987 (P.L. 100-93). These acts require that State licensing authorities, medical malpractice insurers, and certain health care entities report to the Secretary or his designee any adverse actions they take against health care practitioners. Moreover, they are required to make these reports on a timely basis and to include specific information on the actions taken against the practitioners.

The concerns put forth by MFCUs appear to rest as much or even more in apprehension about how outcome-oriented performance indicators would be used as an oversight tool than in the idea of such indicators in themselves. We can understand their apprehension. If implemented in a hasty, ill-considered manner, performance indicators could, indeed, be counterproductive. It is for that reason that we stressed that in adapting performance indicators, the Office of Investigations (OI) should:

- introduce them on a gradual basis;
- strive for consensus on what indicators should be used;
- use existing data sources to develop indicators;
- focus on performance over a 2- or 3-year period; and
- avoid an over-reliance on indicators.

The last point is at the core of many MFCUs' concerns. We recognized that from our discussions with them and largely for that reason stated the following caution on page 7 of our report:

"...even at best, these indicators will not provide a complete picture of an MFCU's performance. Also needed are careful on-site observations and reviews of an MFCU's reports and reapplication materials. Each MFCU is different. Each has certain circumstances that affect its performance. The OI's oversight must be sufficiently fine-tuned that it takes account of these circumstances in making recertification decisions."

Further, the specific indicators we recommended concerning indictments, convictions, and dollar judgments were meant only as a start. We intended that OI and the MFCUs examine their appropriateness over time and explore refinements and additions that might be made in the years ahead. By no means did we intend, as some MFCUs seem to have concluded, that OI maintain an exclusive focus on these indicators.

We hope that this clarification will help to make our recommendations somewhat more palatable to the MFCUs. The Florida MFCU's response suggests that this could be the case. It indicated that the use of indictments, convictions and dollar judgments by themselves was "unacceptable." But then it added: "These three performance indicators may have some value if they were combined with other valid indicators." That is precisely what we would like to happen, with OI and the MFCUs determining jointly those additional indicators.

What might also help in this regard is to reinforce our point about the gradual introduction of performance indicators. We recognize that their use would be a significant departure from past practice and would present particular sensitivities in the law enforcement field. Thus, we suggest that OI and the MFCUs regard the first 2 years of their use as a phase-in period, with a mutual commitment to identify and implement reasonable indicators, addressing outcome and process.

As we reviewed the MFCU comments, we identified four major explanations for why quantitative outcome measures would be inappropriate for MFCUs and four general recommendations concerning how OI might approach its oversight responsibilities. Below, we present each of these, in capsule form, and in each case offer a brief response.

- They would result in a de facto quota system.

Unquestionably, this was the most frequent and intensely felt concern about the adoption of performance indicators. There were numerous statements about how such an oversight tool could lead State prosecutors to become "bounty hunters," make them vulnerable to charges of prejudice by defense counsels, and compromise their ethical commitment to maintain independent and impartial judgment.

These are serious concerns, which we share. However, we did not call for the establishment of quotas and, in fact, went to considerable length to suggest that performance indicators not be used in that fashion. We urged that after a 1- or 2-year developmental period, OI, with the participation of MFCUs, establish specific performance based standards, not quotas. Those falling below a standard would then be required to develop a corrective action plan, *unless* a compelling reason existed for its sub-standard performance. The OI and MFCUs should discuss, in advance, what kind of reasons might be regarded as "compelling."

The key question, it seems, becomes that of whether or not performance indicators, despite our intentions, would become a "de facto" system of quotas. In this context, the National Association asserts:

"An exclusive focus on the indictment, prosecution and recovery ratios of Fraud Units would initially result in the creation of de facto prosecution quotas."

It could well be correct. However, as we have indicated, we are not by any means suggesting an "exclusive" focus on these indicators, or, for that matter, any indicators. We see them as one element of oversight to be accompanied by many other elements. In this regard, we fully agree with the following comment by the Hawaii MFCU:

"If the proposed performance indicators are intended to help unit managers to improve their unit's performance, there must be a balance between process factors and outcome factors. If there is a breakdown in the process by which cases are handled by a unit there may not be a substantial indication of this breakdown if only outcome factors are examined."

Moreover, with careful implementation by OI, we do not feel it is inevitable that performance indicators will turn into de facto quotas. The California MFCU expressed a similar view:

"With respect to performance indicators, we believe it to be appropriate and useful for the agency charged with oversight to utilize objective criteria in the evaluation process. These criteria must be utilized with judgment which is fundamental to any evaluative process. Based upon our experience, the availability of objective criteria provides a sound basis to be used in measuring performance. While the develop-

ment of a quota system for the Units would be undesirable, I do not feel that the utilization of performance indicators would necessarily result in quotas."

- They would ignore differences in the States' legal and penal systems.

The MFCUs fear that in using a national set of performance indicators, OI will lose sight of particular features of individual State legal and penal systems that have an important bearing on outcomes such as indictments, convictions, or dollar judgments. Some MFCUs, they point out, have much more discretion and authority than others. Some State court systems are much more responsive than others. It would be unfair to ignore these differences in reviewing an MFCU's performance.

We agree. That is why the ratios we set forth are only indicators and should be accompanied by thorough on-site review, addressing the particular environment of an MFCU. At the same time, from a national perspective, it is also pertinent to focus on the overall results of a particular MFCU. If over a number of years, an MFCU is performing well below a national norm, that reality is of relevance to a Federal oversight entity, even if the reasons are more State-specific than MFCU-specific. In a broad sense, the Federal financial support being extended is to the State government, not just to the MFCU.

- They would ignore differences in the type of cases being prosecuted.

Here, again, MFCUs are concerned that some important distinctions would not be made. Some cases, such as those involving nursing homes, hospitals, or health maintenance organizations, are extremely costly and likely to span a number of years. If OI were to stress quantitative measures of success, it would provide a disincentive for these more complex cases. Similarly, patient abuse investigations, which seldom result in indictments or financial recoveries, but yet are of considerable importance, would be discouraged.

Our response is the same as that noted above. The OI should not use the indicators in a rigid manner and should take those factors into account when assessing a particular MFCU. Here, too, in arraying and reviewing performance data, it might find it helpful to make certain distinctions--for instance, it might distinguish indictments, convictions, and dollar judgments by type of provider and thereby facilitate an analysis of the degree of difficulty in the cases being prosecuted.

- They would ignore the MFCUs' dependence on referrals from State Medicaid agencies.

MFCUs are highly dependent on the extent and quality of the cases being referred to them by the State Medicaid agencies. All things considered, where the quantity and quality of the referrals are relatively high, the likelihood of high MFCU performance is enhanced, and vice versa. If OI failed to take this into account in assessing performance, its oversight, argue the MFCUs, would be faulty.

We agree. Moreover, we noted on page 20 of our report, that some MFCUs felt they were not getting sufficient referrals and that the OIG should consider a regulatory amendment that would clarify the MFCUs' authority to engage in sophisticated detection activities and in fraud screening activities. The Office of Analysis and Inspections in Region III is now conducting an inspection that addresses the extent and quality of referrals from State Medicaid agencies to MFCUs and will offer more specific recommendations concerning this matter.

- The OI should focus its oversight of MFCUs on their overall management of the investigative process.

The National Association and many of the individual MFCUs urged that OI should key its oversight to process elements such as case flow and investigative effectiveness. Through inquiry of this kind, they suggested that OI would be able to identify any production problems and hold MFCUs accountable for their performance.

We agree that such process considerations should be a vital element of the valiative effort. Perhaps they should even be the dominant element. However, we still hold to the view that some quantitative measurements of a set of outcome valuables, such as indictments, convictions, and dollars recovered should also play an important part in the valiative effort.

It is quite reasonable, we believe, for the Congress and Department to be kept apprised of the overall effectiveness of MFCUs, for which Federal financial support is provided. It is certainly important in that regard to assess the effectiveness of the investigative process. But it is also important to be able to determine the extent to which that process, however effective, is contributing to the broad purpose of eliminating fraud in the Medicaid program.

In short, the Department and Congress have a responsibility to assess how much and what kind of impact the MFCUs are having in the States. Inevitably, this calls for a broad frame of reference, one encompassing not just the MFCUs themselves but the State criminal justice systems as well.

- The OI should conduct its oversight of MFCUs on a qualitative basis, using personnel with training and experience in white collar crime.

The MFCUs are concerned that the introduction of some quantitative outcome measures will lead to a rigid "by-the-book" approach to evaluation of their performance--one that will devote insufficient attention to the complexities of law enforcement.

We understand this concern. That is why we have underscored in this appendix and throughout the report the need to use outcome measures in a balanced and careful man-

ner. We agree that qualitative evaluation is important and that individuals with expertise in white collar crime should be involved in making those evaluations.

- The OI should conduct its evaluations of MFCUs on a unit-by-unit basis, recognizing the distinctive features of each unit and its operating environment.

The concern expressed here is similar to that noted above--that some general measures and rules will be used to assess all MFCUs.

Once again, our response rests in a call for balance. Clearly, on-site investigation and an appreciation for the unique features of that site must be part of the evaluation process. Yet it is also reasonable to have some yardsticks for assessing all MFCUs. It facilitates consistency and fairness in the evaluation process. In this context, the following excerpt from the California MFCU's comments bear consideration:

"...the development of objective criteria, if properly used, takes the 'mystery' out of performance evaluations. Further, the Unit's ability to document enforcement and other activities strengthens, rather than weakens, our integrity. As each state is competing for its share of the state budget, so are we as a National entity vying for continued federal support. To the extent we are able to quantify the process through the use of objective data, we strengthen our case."

- The OI should recognize that the ultimate goal of MFCUs is to deter Medicaid fraud and patient abuse.

It seems reasonable to assume, as a number of the MFCUs do, that the activities of MFCUs can have a significant deterrent effect on fraud and patient abuse, even if they lead to little in the way of indictments, convictions, or dollar recoverances. Yet it is also reasonable for an oversight agency to rely upon something more than an assumption in assessing the significance of the deterrent effect in a particular State.

Therein lies a key question. What are some useful indicators of a deterrent effect? This is a question which OI and the MFCUs should explore jointly. If they can identify some such indicators, they should develop and test them, along with those we suggested. Surely if the deterrent effect is to be used as a major justification for the effectiveness of MFCUs, some such effort is essential. Otherwise, how are OI and other concerned parties to gauge how much significance to attach to deterrence?

Conclusion

We continue to feel that OI should use quantitative outcome measures as part of its oversight of MFCUs. Moreover, we believe that if OI develops them with the participation of

the MFCUs and uses them in a balanced and careful manner, most MFCUs will be supportive of the approach.

The MFCUs' deepest concerns rest in the rigid application of performance indicators in a way that would lead, however, inadvertently, to a system of quotas. At a broad, conceptual level, however, most MFCUs see some value to the use of indicators in the way we suggested. This was clearly suggested in our telephone discussions when about two-thirds of the MFCU directors felt that performance indicators using indictments and convictions per professional staff were "worth serious consideration."

Performance indicators are being used with increasing success in other fields. In the law enforcement field, there are particular sensitivities, as the comments pointed out, that must be addressed. But as we have attempted to indicate, they still can serve as an important part of the oversight process.

Minimum Staffing Levels

In our draft report we recommended that the minimum staffing requirement for MFCUs be increased from 3 to 10 professional positions. This recommendation did not elicit as much reaction as those concerning performance indicators. But most of those that did respond felt it was too high. A number of MFCUs and the National Association suggested that five would be a more appropriate minimum.

Even though we noted that OI should be authorized to grant a waiver from the minimum when "special circumstances" made it "unreasonable or unnecessary," the respondents still felt it was excessive for the smaller States that would be affected. They noted that the States with less than 10 staff were not necessarily less productive than the others and that in some cases they might not be able to generate sufficient political and financial support at the State level to function at the higher level.

We gave careful consideration to the concerns expressed. For the reasons stated in the report, we still believe that in nearly all cases it is important to establish a minimum of 10 professional staff. However, we do recognize that there are States where a lesser level might be more appropriate for a particular period of time. Thus, we have lowered our recommended minimum from 10 professional positions to 7 to 10. The OI, we think, is best suited to determine the actual number. In concert with that change, we have removed our suggestion that waivers be allowed under special circumstances and instead, have urged that MFCUs with less professional staff than the established minimum be allowed a phase-in period to reach that minimum. We think that such an approach will allow for more equitable and simpler administration.

Final Note

In our draft report, we recommend that the Department amend the MFCU regulation to (1) clarify that MFCUs can engage in sophisticated detection activities and to authorize

and (2) authorize MFCUs to engage in fraud detection screening activities. This and another recommendation in the addendum were supported more by the experience of the OIG in conducting oversight of the MFCUs than by the inspection itself.

Because of our limited data base on the issue and because the Region III Office of Analysis and Inspections is conducting an inspection that will shed further light on it, we have modified our recommendation to suggest that OI "consider" developing a regulatory proposal concerning the MFCUs' authority to engage in sophisticated detection activities and in fraud detection screening activities.